EUGENE M. WITT

IBLA 84-335 Decided February 26, 1986

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, dismissing a protest of Native allotment application F-14285 and finding that the application was legislatively approved under the Alaska National Interest Lands Conservation Act.

Set aside and remanded.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests

   The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

2. Alaska National Interest Lands Conservation Act: Native Allotments -- Words and Phrases

   "Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

3. Alaska National Interest Lands Conservation Act: Native Allotments

   A dirt airstrip is an improvement within the meaning of sec. 905(a)(5)(C) of ANILCA.

4. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Rules of Practice: Appeals: Standing to Appeal

   While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision

approving a Native allotment application under sec. 905(a)(5)(c) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

APPEARANCES: Eugene M. Witt, pro se; Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Calvin M. Tritt.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Eugene M. Witt has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dismissing his protest filed against Native allotment application F-14285 and finding that the allotment application had been legislatively approved under section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1982).

Native allotment application F-14285 was filed with BLM on September 21, 1971, by Calvin M. Tritt. The parcel applied for borders a portion of Timber Lake in secs. 23 and 26 of unsurveyed T. 12 S., R. 24 E., Umiat Meridian, Alaska. The application claimed seasonal use and occupancy for hunting and fishing, beginning April 1, 1963.

Appellant's protest was filed May 29, 1981. It appears that he works as a big game hunting guide and operates a camp on the west shore of Timber Lake near the land embraced by the allotment application. In his protest, appellant asserted that the applicant had not made substantially continuous use or occupancy of the land for 5 years as required by the Native Allotment Act; that there were no signs of use, occupancy, or improvements by the applicant; and that between August 1, 1968, and September 18, 1980, appellant had used and occupied the land and made improvements upon it in support of big game guiding and wilderness operations.

A field examination of the parcel had been conducted by BLM on September 20, 1974. Subsequent to the filing of Witt's protest, a second examination was made on April 11, 1983. The latter examination found no improvements on the ground and recommended that the protest be dismissed. Based upon its review of the field reports and other documents in the case file, the Fairbanks District office concluded that "there are no improvements on this allotment as stated by the protest and that the applicant has had sufficient use of the land" and further held that the allotment had been legislatively approved as of June 1, 1981.

On appeal, Witt asserts that his improvements consist of the major part of a 200-yard bush airstrip for which he cleared boulders, rock, and brush and filled in hollow areas. In addition, he claims that at the time of the examination he had cached on the area two 50-gallon drums and two canoes. In response, Tritt argues that storage of drums and canoes is not an improvement because they can be moved at will, and questions whether an airstrip is an improvement. He further argues that appellant's protest is invalid per se because the land became segregated when his (Tritt's) occupancy commenced in 1963, continued to be segregated by his seasonal use for hunting and fishing, and, since 1970, has been segregated by his Native allotment application so that any improvements made by Witt have been based on trespass.

It is clear that the critical issue in this appeal is the validity of appellant's protest, since BLM, in effect, decided it was ineffective to prevent legislative approval of the allotment. Initially, therefore, we must consider the effect of the protest under ANILCA and ANILCA's relation to the Native Allotment Act under which the Native applicant filed his application.

As amended in 1956, the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). Entitlement to an allotment was dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970). By regulation, "substantially continuous use and occupancy" includes

> the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

As with all legislation authorizing the conveyance of title to Federal lands, the Secretary of the Interior has a duty to insure that statutory requirements are met before conveying title. See United States v. New Jersey Zinc Co., 74 I.D. 191, 205-06 (1967). In order to meet this obligation, the Secretary required applicants to submit proof of their use and occupancy, see 43 CFR 2561.2, and BLM personnel would conduct a field examination of the land. An office adjudication would then be made to determine whether the applicant had met the requirements of the Act. 1/

The Native Allotment Act was repealed on December 18, 1971, by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1982), but applications pending before the Department as of the date of repeal were allowed to proceed to patent. Subsequently, section 905(a)(1) of ANILCA provided that, with certain exceptions, pending applications for land that was "unreserved on December 13, 1968, or land within the National Petroleum Reserve -- Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following December 2, 1980." 43 U.S.C. § 1634(a)(1) (1982). Among the exceptions is the provision of section 905(a)(5)(C) that the legislative approval does not apply if, within the specified 180 days: "A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity." 43 U.S.C. § 1634(a)(5)(C) (1982).

1/ If it were then determined that the Native allotment applicant had not established the requisite use and occupancy a contest complaint would normally issue. See generally Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976).

By its terms, in order for the exception created by section 905(a)(5)(C) to preclude approval of an application under section 905(a)(1), three pre-requisites must be met. First, a protest must be filed; second, it must be filed within the 180-day deadline established by section 905(a)(1); and third, the protestant must allege and, if necessary, show that improvements exist on the land. In the present case, based on the facts of record noted above, we find that appellant did file his protest within the statutory deadline. Thus, the issue to be decided is whether appellant's alleged use of the land for equipment storage and construction of an airstrip qualifies as an "improvement."

In considering other cases arising under section 905(a)(5)(C) we have had little difficulty in concluding that a house, carpenter shop, trail, and shoreline cleared of rocks qualified under the provision. Bill Nekeferoff, 62 IBLA 170 (1982). Similarly, we had no problem in finding that a portion of the trans-Alaska pipeline was an improvement under the statute. Alyeska Pipeline Co., 52 IBLA 222 (1981). These cases, however, are of little assistance in answering the present question. For this reason we turn to ANILCA and its legislative history for an indication of congressional intent.

In contrast to the heated and lengthy debates which characterized consideration of many of ANILCA's provisions in the 95th and 96th Congresses, a search of the legislative history reveals that little attention was given to section 905 and only a few changes were made to its text during consideration of the Act. Compare S. Rep. No. 1300, 95th Cong., 2d Sess. 37-39 (1978), with 43 U.S.C. § 1634 (1982). No direct history has been found indicating that any special meaning was intended to apply to the term "improvements." The relevant reports merely state, following the language of the Act, that, like protests submitted by the State of Alaska or Native village and regional corporations under subsections 905(a)(5)(A) and 905(a)(5)(B), "Persons or entities claiming improvements embraced by another's allotment application may similarly require adjudication of the application by filing a timely protest." S. Rep. No. 413, 96th Cong., 1st Sess. 285, reprinted in 1980 U.S. Code Cong. & Ad. News 5229. 2/

Nevertheless, within the context of previous administrative procedure and legislative commentary, the purpose of section 905 and the effect of subsection 905(a)(5)(C) is clear. As noted in the Senate Report, programs implemented immediately prior to the repeal of the Native Allotment Act by ANCSA resulted in thousands of applications for Native allotments being filed with the Department of the Interior. Id. at 237, U.S. Code Cong. & Ad. News at 5181. However, the process of conducting a field examination and adjudication of each parcel was "time-consuming and expensive" and this, in turn, resulted in lengthy delays in conveyances to village and regional corporations under ANCSA. Thus, the purpose of the statutory language

2/ We note, however, that in discussing the term "improvements" used in section 905(b) of ANILCA, the following examples were given parenthetically, "cabin, fishracks, fishwheel or tentsite." Id. There is no indication that the "improvements" referenced in section 905(b) were intended to be different in any manner from those which could serve as a basis for protest in section 905(a)(5)(C).

providing that "all Alaska Native allotment applications * * * are hereby approved" was to forestall any challenge as to an applicant's entitlement save for specified exceptions expressly provided by the Act. See generally Eugene M. Witt, 90 IBLA 265 (1986).

[1] Not all Native allotment applications, however, were subject to legislative approval. Applications for certain lands that might be valuable for minerals, or lands within units of the National Park System and other described lands, or lands within licensed power projects, were to be adjudicated pursuant to the provisions of the Native Allotment Act. See generally 43 U.S.C. § 1634(a)(3), (a)(4), and (d) (1982). Congress was also aware that some of the lands sought by Natives might be subject to competing claims and uses. Thus, it provided that applications for land for which there was "any record entry or application for title" made under an act other than ANCSA, the Alaska Statehood Act, or the Native Allotment Act were to be adjudicated by the Secretary of the Interior prior to issuing a certificate for the allotment. 43 U.S.C. § 1634(e) (1982). In addition, Congress provided that the approval provision "shall not apply and the Native allotment application shall be adjudicated pursuant to the requirements of the [Native Allotment] Act" if a Native corporation, the State of Alaska, or a person or entity who claims improvements on the land filed a timely protest. 43 U.S.C. § 1634(a)(5) (1982). The effect of such a timely filed protest under section 905(a)(5)(C) is to preclude legislative approval under section 905(a)(1) and require adjudication pursuant previously established administrative procedures in order to determine compliance with the Native Allotment Act. See State of Alaska, 85 IBLA 196, 201 (1985); Walter Titus (On Reconsideration), 77 IBLA 321, 322 (1983).

[2] Given this statutory scheme, several points can be made regarding the scope of the term "improvements" as used in section 905(a)(5)(C). First, Congress did not intend to require a showing that the improvements were made or constructed pursuant to an entry or application under the public land laws. Such an interpretation would make redundant the provisions of section 905(e) which required the Secretary to adjudicate such conflicting entries prior to issuing an allotment without necessitating the filing of a protest. Second, it is unlikely that any special meaning of "improvements" was intended. Rather, since the purpose of section 905 was to speed the processing of Native allotment applications when there were no conflicting claims for the land, the term "improvements" works as a limitation to the right of any third party to protest action before BLM. See generally, Eugene M. Witt, supra. Thus, in the absence of any entry of record a third party could protest issuance of a Native allotment only if he claimed improvements on the land embraced by the allotment application. In this sense, we believe that the term "improvements" must be contrasted with more limited terms such as "structures" and broader terms such as "use." Its meaning is its legal meaning in relation to real property, as discussed below.

The requirement that an individual claim "improvements" on land as a precondition to the exercise of a statutory right is not unknown in public land law. Thus, the Color of Title Act, 43 U.S.C. § 1068 (1982), provides, inter alia, that the Secretary shall issue a patent for land held in good faith under color or claim of title for 20 years provided that "valuable improvements have been placed on such land or some part thereof has been

reduced to cultivation." Class I color-of-title applications have been the subject of considerable Departmental adjudication. Thus, in Lillian Zellmer Sharlein, A-28198 (Apr. 19, 1960), clearing of brush which made a lake beach available for recreational purposes was held to be a valuable improvement. In Benton C. Cavin, 83 IBLA 107, 121-22 (1984), we held that the planting of seedlings and the thinning and pruning of coniferous trees constituted placement of improvements on the land. The test of whether something is an "improvement" can normally be seen as requiring a demonstration that the activity enhanced the present value of the land. See generally, Ben S. Miller, 55 I.D. 73 (1934). We see no reason why this same test should not be used in determining whether claimed "improvements" are sufficient to predicate a protest under section 905(a)(5)(C) of ANILCA.

[3] Reviewing the allegations in the present case, we agree with Tritt that placing 50-gallon drums and canoes on the land would not qualify as an improvement within the legal meaning of the term, as they could impart no enhancement in value to the land. However, we find that construction of a dirt airstrip would qualify as an improvement. If appellant's allegations are true, the presence of an airstrip indicates both a conflict as to the use of the land, so that legislative approval would not be appropriate, and, further that applicant's use and occupancy may not have been potentially exclusive, as required under the Native Allotment Act.

[4] Tritt argues that the land he has applied for has been segregated since his use of it began in 1963 and that improvements made in trespass should not be considered as qualifying under section 905(a)(5)(C).

This argument is doubly flawed. Technically, segregation of the land occurred only upon the filing of the Native allotment application on September 21, 1971. See 43 CFR 2091.6-5, 2561.1(e). While it is true that Native use and occupancy would have prevented the initiation of third party rights to the land, even in the absence of an allotment application (see generally United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981)), the question whether such use and occupancy existed is one of fact and appellant had expressly denied any prior existing Native use in his protest. Assuming arguendo that appellant's allegations of non-use are true, the land would have been open to appropriation until January 23, 1969, the date of promulgation of Public Land Order No. (PLO) 4582, 34 FR 1025. 3/ Any improvements placed prior to that time would not have been in trespass. In any event, as other provisions of ANILCA indicate, Congress was aware that many uses have been made of the public lands in Alaska without express permission, license, permit, or other sanction from the federal government (see sections 801-816, 1303, 1316 of ANILCA) and could have expressly excluded unauthorized use from the scope of section 905. Since it did not do so, we cannot. 4/ Cf. Fred J. Schikora, 89 IBLA 251 (1985).

3/ PLO 4582 withdrew all vacant and unappropriated land in Alaska in aid of legislation to determine and protect the rights of Native Aleuts, Eskimos, and Indians in Alaska.

4/ Moreover, all that a protest under section 905(a)(5)(C) accomplishes is to require adjudication of the allotment application under the Native Allotment Act, supra. Since all allotment applicants necessarily allege compliance

Because we find that a dirt airstrip would qualify as an improvement under section 905(a)(5)(C), we turn next to review the factual determination made by BLM that "there are no improvements on this allotment as stated by the protest * * *."

Initially, we must examine appellant's standing to appeal from the denial of his protest. In Fred J. Schikora, supra, we held that the interest of a trespasser who made improvements upon land without color or claim of right was insufficient to serve as the legally cognizable interest which an individual must have to seek review from a determination granting a conflicting Native allotment application. Id. at 256. In Eugene M. Witt, supra, however, we differentiated between an appeal from a favorable adjudication of the allotment after a recognized protest and the rejection of a protest for a perceived deficiency therein. In Witt we held that though a trespasser may not appeal following a substantive denial of his protest, he could appeal from a procedural refusal to consider his protest. In the instant case it is clear that, owing to the failure of BLM to discover any improvements on the land, BLM refused to adjudicate the allotment application. 5/ This was a procedural rejection and, as such, is properly subject to appeal by Witt.

Two field investigations were conducted by BLM. On the first, made on September 20, 1974, BLM investigators were accompanied by William Tritt, apparently a cousin of the applicant. The report states that, "No improvements were found on the claimed land" and that, "No firepits or other improvements were found after a thorough search of the applied for land." In addition, in item 12 of the report, labeled, "Each subdivision of tract has evidence of use by applicant," the answer, "No" is circled and the words "No use of any kind found or shown by William Tritt" are written in. 6/ On July 27, 1982, after receipt of appellant's protest, a supplemental field investigation was requested. It was conducted April 11, 1983, by BLM personnel accompanied by the applicant. Again, no improvements or signs of use were reported. An additional handwritten memorandum filed with the report states in part that, "No improvements of any sort were observed on Calvin's Allotment which was viewed by a helicopter fly by. (snow was several feet deep)."

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with the Act, requiring them to show such compliance would not be considered particularly onerous. It might well be that for this reason Congress determined not to prevent owners of improvements, even where they were made in trespass, from triggering the mechanism whereby an allotment applicant would be required to show entitlement under the Act.

5/ While the decision did aver that "the applicant has had sufficient use of the land," it is clear that BLM did not consider Witt's protest to be valid. Thus, the decision declared "this allotment protest is invalid" and further stated that the allotment application "has been legislatively approved, effective June 1, 1981." A valid protest, however, prevents legislative approval and requires adjudication under the Native Allotment Act.

6/ The 1974 field report did note that a canoe was present on the land, which was marked with Witt's name. This provides at least some corroboration that Witt had, in fact, used the parcel.

While we would generally be inclined to find that a field investigation by BLM personnel gives a sufficient factual foundation for a BLM decision based upon it, in the present case we cannot. As noted by the investigator at the time of the second investigation, the land was covered with several feet of snow. Photographs filed with the second field report clearly show that the land applied for is a relatively flat area and that at the time of the investigation it was completely covered with snow. Because the airstrip claimed by appellant would obviously be beneath the snow, we cannot accept BLM's inference that the improvement did not exist.

We recognize that appellant's failure to specifically describe his improvements may well have been a causative factor in BLM's failure to adequately examine the lands in order to determine whether improvements existed. Unfortunately, while section 905(a)(5)(C) requires that the protestant allege that the land is the situs of improvements it does not, by its terms, require that the protestant state the nature of his improvements. 7/ Nor does any regulation so direct. While we are not unsympathetic to the problems which faced BLM in the instant case, we cannot hold appellant to a standard of specificity which is provided neither in the statute nor regulations. In the future, BLM might well decide to issue an order directing a protestant to describe the nature and extent of his improvements prior to conducting any physical examination of the land.

For the foregoing reasons we must set aside BLM's decision and remand the case for further action. Initially BLM should determine whether appellant has constructed a dirt airstrip as alleged. If BLM finds that the airstrip does not exist, the protest could not operate to preclude legislative approval of the application under section 905 and may be summarily denied.

If BLM should find that an airstrip was constructed by appellant, then his protest precludes approval of the application under section 905 and the application must be adjudicated to determine the applicant's compliance with the requirements of the Native Allotment Act.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to BLM for action consistent with the opinion.

James L. Burski
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge

7/ In this regard section 905(a)(5)(C) contrasts with section 905(a)(5)(B) which requires a protest by the State of Alaska to declare "with specificity the facts upon which the conclusions concerning access are based."